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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 180

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, ET AL,

PETITIONERS,

v.

RISS AND COMPANY, INC.,

RESPONDENT

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE PETITIONERS

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INDEX

	Page
Opinions Below	1
Jurisdiction	1
Statutes Involved	2
Questions Presented	2-3
Statement	3
A. The Facts	3
B. The Proceedings Below	5
Argument	6
I. Since under the collective bargaining agreement between the parties the award of the Joint Area Cartage Committee is final and binding, the award is enforceable in the Federal District Court pursuant to Section 301 of the Labor Management Relations Act, regardless of whether it is the product of "arbitration" or some other form of settlement chosen by the parties	6-7
II. The Federal District Court was not deprived of jurisdiction over the Union's action to enforce the award of the Joint Area Cartage Committee merely because one of the benefits of the award would accrue to individual employees represented by said Union	12
III. The Court below exceeded the bounds of the permissible scope of review by making a decision on the merits of the grievance and, in so doing, resolving disputed facts without the benefit of evidence or argument by the parties	20
Conclusion	24

AUTHORITIES CITIED

1. Cases Page

Aeronautical Industrial District Lodge 72 v. *Campbell*, 337 U.S. 521 (1949) 18

American Brake Shoe Co. v. *Auto Workers Local 149*, 285 F2d 869 (7th Cir. 1961) 18

Association of Westinghouse Salaried Employees v. *Westinghouse Electric Corp.*, 348 U.S. 437 (1955) 6, 12, 13, 14, 15, 16, 19

Carr v. *Corning*, 182 F2d 14 (D.C. Cir. 1950) 22

Charles Dowd Box Co. v. *Courtney*, 368 U.S. 502 (1962) 13

Denver-Chicago Trucking Co., 132 NLRB No. 123, 48 LRRM 1524 (1961) 8

Ex parte Century Indemn. Co., 305 U.S. 354 (1938) 22

General Electric Co. v. *Local 205, UEW*, 353 U.S. 547 (1957) 16

Hurn v. *Oursler*, 289 U.S. 238 (1933) 15

Item Co. v. *N.O. Newspaper Guild*, 256 F2d 855 (5th Cir. 1958), cert. den. 358 U.S. 867 (1958) 17

J. I. Case Co. v. *NLRB*, 321 U.S. 332 (1944) 19

Lincoln Gas & E. L. Co. v. *Lincoln*, 250 U.S. 256 (1919) 15

Local Lodge 2040, IAM. v. *Servel, Inc.*, 268 F2d 692 (7th Cir. 1959) 18

Local 24, Teamsters v. *Oliver*, 358 U.S. 283 (1959) 11

MacKay v. *Loew's, Inc.*, 182 F2d 170 (9th Cir. 1950) 19

Retail Clerks v. *Lion Dry Goods, Inc.*, 369 U.S. 17 (1962) 9, 10

Siler v. *Louisville & N. R. Co.*, 213 U.S. 175 (1909) .. 15

Smith v. *Evening News Ass'n*, Case No. 13 (October Term, 1962) 14

Steele v. *Louisville & N. R. Co.*, 323 U.S. 192 (1944) 18

Page

Textile Workers Union v. *Cone Mills Corp.*, 268 F2d 920 (4th Cir. 1959) cert. den. 361 U.S. 886 (1959) 18

Textile Workers Union v. *Lincoln Mills*, 353 U.S. 448 (1957) 9, 13, 16, 17

United States v. *Hoffman*, 335 U.S. 77 (1948) 22

United Steelworkers v. *American Mfg. Co.*, 363 U.S. 564 (1960) 9, 16, 22

United Steelworkers v. *Enterprise Corp.*, 363 U.S. 593 (1960) 9, 16, 23

United Steelworkers v. *Pullman—Standard Car Mfg. Co.*, 241 F2d 547 (3rd Cir. 1957) 17

United Steelworkers v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960) 8, 16

2. Statues

Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. § 151, *et seq:*

Section 9 ..... 19, 20

Section 301 2, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 20, 21

3. Miscellaneous

Black, Law Dictionary, 4th ed. (West Publishing Co. 1957) 8

Cox, "The Legal Nature of Collective Bargaining Agreements," 57 Mich. L. Rev. 1, 24 (1958) 13, 18

Gregory, "The Law of the Collective Agreement," 57 Mich. L. Rev. 635, 642-643 (1959) 13

Meltzer, "The Supreme Court, Congress, and State Jurisdiction over Labor Relations," 59 Col. L. Rev. 269, 272 (1959) 15

Shulman, "Reason, Contract, and Law in Labor Relations," 68 Harv. L. Rev. 999 (1955) 19

Ward and Groner, "Major Agreement Expirations and Reopenings in 1962," Monthly Labor Review, pp. 1316-1317 (December 1961) 11

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (R. 27) is reported at 298 F2d 341. The Order of the United States District Court for the Western District of Kentucky (R. 7), granting respondent's motion to dismiss the complaint, is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 31, 1962 (R. 26), and its Order denying a petition for rehearing was issued on March 21, 1962 (R. 30). This Court granted Certiorari on October 8, 1962 (R. 31). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTES INVOLVED

Section 301 of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. Sec. 185, provides as follows:

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States, having jurisdiction of the parties, without respect to the amount of controversy or without regard to the citizenship of the parties."
>
> "(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets."

QUESTIONS PRESENTED

1. Whether, under Section 301 of the Labor-Management Relations Act, federal district courts have jurisdiction of an action brought by a labor organization against an employer to enforce an award rendered by a bipartisan grievance committee pursuant to a collective bargaining agreement between the foregoing parties, whereby the said committee is constituted as the last step in the grievance procedure and its decisions are made final.

2. Whether the federal district courts are deprived of jurisdiction to enforce the award, as aforesaid, on the sole

ground that one of the benefits of said award accrues to individual employees who are represented by the plaintiff-labor organization.

3. Whether, in the foregoing context, a federal court of appeals exceeds the bounds of the permissible scope of review by making a decision on the merits of the grievance contrary to that of the grievance committee and, in so doing, resolving disputed facts without the benefit of evidence or argument by the parties.

STATEMENT

A. The Facts

Petitioner, General Drivers, Warehousemen and Helpers, Local Union No. 89 (hereinafter called Local 89), is a labor organization affiliated with the International Brotherhood of Teamsters, having its principal office in Louisville, Kentucky. The individual petitioners are members of said Local 89 and employees of respondent Riss and Company, Inc. (R. 2).

The respondent, Riss and Company, Inc., (hereinafter called Riss), is a Delaware corporation engaged in the interstate transportation of freight by motor vehicle, maintaining a freight terminal in Louisville, Kentucky. (R. 2).

At all times material herein, there was in full force and effect a collective bargaining agreement between Local 89 and Riss, governing the wages, hours and working conditions of the employees of Riss at the Louisville terminal (R. 3).

Article VIII, Section 1 of said agreement provides as follows (R. 8):

> "The Unions and the Employers agree that there shall be no strike, lock out, tie-up, or legal proceedings without first using all possible means of a settlement, as provided for in this Agreement, of any controversy which might arise."

Under Articles VII and VIII, the grievance procedure consists of several "steps," commencing with informal discussion between the parties and progressing through appeals to bipartisan Committees called Joint Local Area Committee, Joint State Cartage Committee, and Joint Area Cartage Committee. (R. 8-9). Subsections (a) and (c) of Article VIII, Section 1 state that majority decisions of the Joint Local Area Committee and the Joint State Cartage Committee "will be final and binding on both parties." (R. 8-9). In the event these two Committees fail to reach a decision, subsection (d) affords an appeal to the Joint Area Cartage Committee. While in some such cases, the parties may agree to determination by an umpire, "matters pertaining to interpretation are not subject to umpire handling at this level." (R. 9). Subsection (e) states the following (R. 9):

> "It is agreed that all matters pertaining to the interpretation of any provisions of this contract shall be referred, at the request of any party at any time, for final decision to the Joint Area Cartage Committee after first being processed by the Joint State Cartage Committee."

Subsections (f) and (g) provide that only in case of deadlock, or failure of a Committee to meet without fault of the complainant, or refusal of either party to submit to or appear pursuant to the above procedure, or "failure to comply with any final decision," may the parties resort to other legal or economic recourse. (R. 9). Subsection (h) states that no interpretation of the Agreement by any tribunal is to be binding "it being the intention of the parties to resolve all questions of interpretation by mutual agreement." (R. 24).

One other provision central to this controversy is Article IX:

> "It shall not be a violation of this contract and it shall not be cause for discharge if any employee or employees

refuse to go through the picket line of a union or refuse to handle unfair goods." (R. 4, 29).

On or about January 25, 1960, during the course of a labor dispute between Riss and Teamsters Local 107 of Philadelphia, Pennsylvania, Local 107 placed pickets at the Riss terminal in Louisville. The six individual petitioners herein, employees of Riss at Louisville, chose to respect and did respect the said picket line. On February 15, 1960, the six employees reported for work, and Riss refused to permit them to return to work. Thereupon, they filed grievances against Riss, seeking reinstatement and back pay, pursuant to the aforementioned provisions of the collective bargaining agreement. (R. 3).

The grievances were processed through the various steps of the grievance procedure, with full participation by the employees, the Union and the Employer at each and every step. At the terminal point of that process, the Joint Area Cartage Committee rendered a decision and award, directing that the six individuals be reinstated with full seniority and back pay. However, Riss refused and continues to refuse to abide by that decision. (R. 3-4).

B. The Proceedings Below

Petitioners thereupon brought suit against Riss to enforce the award in the United States District Court for the Western District of Kentucky, invoking the jurisdiction of that court under Section 301 of the Labor-Management Relations Act (29 U.S.C. 185). Therein, pursuant to the award, petitioners sought the reinstatement of the six employees with full seniority and back wages and fringe benefits owed them under the various provisions of the agreement (R. 2-7, 10-14). Thus, Petitioners demanded Judgment "that said six employees be reinstated with full seniority under the terms of said contract," that Riss restore to the Health and Welfare Fund and the Pension Plan all per capita payments withheld since the discharge of the em-

ployees, and that the dischargees be paid back wages and vacation pay. (R. 6-7). At a pre-trial conference held on February 2, 1961, and upon the motion of Riss to dismiss, the court sustained the motion and ordered the complaint dismissed for lack of jurisdiction on the authority of *Westinghouse Salaried Employees* v. *Westinghouse Electric Corporation*, 348 U.S. 437 (1955). (R. 7).

Upon appeal to the United States Court of Appeals for the Sixth Circuit, that court affirmed the Order of the district court on three grounds:

First, the order of the Joint Area Cartage Committee was not "an arbitration award" that could be enforced by the courts and, therefore, "recent pronouncements of the Supreme Court with reference to arbitration are not controlling here;"

Second, upon that court's construction of the contract, the complaint did not state a cause of action;

Third, since "the purpose of the action is to recover for the individual plaintiffs lost wages together with incidental benefits to the Union based on the payment of wages to employees," the court is deprived of jurisdiction by *Westinghouse, supra.* (R. 27-30).

A Petition for Rehearing was denied on March 21, 1962, (R. 30).

ARGUMENT

I

SINCE UNDER THE COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES THE AWARD OF THE JOINT AREA CARTAGE COMMITTEE IS FINAL AND BINDING, THE AWARD IS ENFORCEABLE IN THE FEDERAL DISTRICT COURT PURSUANT TO SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT, RE-

GARDLESS OF WHETHER IT IS THE PRODUCT OF "ARBITRATION" OR SOME OTHER FORM OF SETTLEMENT CHOSEN BY THE PARTIES.

The principal ground relied on by the court below in denying federal court jurisdiction over the instant action was that the award of the Joint Area Cartage Committee was not in the nature of "compulsory arbitration" or an "arbitration award" and lacked "finality." Accordingly, reasoned the court, "recent pronouncements of the Supreme Court with reference to arbitration are not controlling here." (R. 8). In this, the court was clearly in error.

Its apparent "findings" that utilization of the grievance procedure of the agreement was not "compulsory" or "final" are flatly contradicted by the explicit and clear provisions of the contract. The parties have chosen a method for settling their grievances whereby bipartisan committees determine controversies importantly affecting the employment relationship. Resort to these committees is compulsory. For under Article VIII, Section 1 of their agreement, the parties forego all means of self-help "without first using all possible means of a settlement, as provided for in this Agreement, of any controversy which might arise." (R. 8). In subsection (e) thereof, the parties agree that all matters of interpretation of the contract "shall" be referred to the Joint Area Cartage Committee after decision by the Joint State Cartage Committee. (R. 9). The decisions of these Committees, moreover, are final and binding upon the parties. Thus, the majority decisions of the lower Committees are "final and binding on both parties." (Subsections (a) and (e); R. 8-9). And the decision of the highest Committee, the Joint Area Cartage Committee, is similarly a "final decision." (Subsection (e); R. 9). Its award in this case was issued in favor of petitioner with full participation by all the parties concerned. In the face of these uncontradicted facts, the contrary as-

sertions of the court below must fall as a matter of law.[1]

Next, even if that which is to be enforced under Section 301 must be "arbitration" or an "arbitration award," as intimated by the court below, the procedure agreed to and utilized by the parties fully qualifies.[2] Moreover, if the decision below is intended to require resort to an *outside umpire* as a prerequisite to Section 301 jurisdiction, it seriously undermines the force of logic and the policies underlying that Section. For there is nothing in the Agreement, or in practice, which suggests that the method chosen by the parties is less capable of maintaining labor peace between them than the process envisioned by that court. If anything, the parties would have greater confidence in their own representatives' personal judgment and knowledge of the common law of the shop than in the knowledge and judgment of an outside arbitrator.[3]

In any event, the decisions of this Court, including their many references to legislative history, as well as the plain meaning of Section 301, demonstrate most emphatically that the federal courts may and should enforce awards rendered

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[1] If a fact issue did exist as to the meaning ascribed by the parties to their grievance procedure, the question should have been decided in the district court, on the basis of record evidence, rather than by the court below.

[2] "ARBITRATION. The submission for determination of disputed matter to private unofficial persons selected in manner provided by law or agreement." Black's Law Dictionary, 4th ed., p. 134 (West Publishing Co. 1957).

[3] It is significant that in *Denver-Chicago Trucking Co.*, 132 NLRB No. 123, 48 LRRM 1524 (1961), the NLRB honored a decision of the Joint State Cartage Committee, which is a part of the grievance procedure of the contract presently before the Court, to the same extent that it had previously honored decisions of arbitrators. Speaking of the instant contract, the Board said: "We note that the grievance procedure had been followed by the parties for 18 years and that it presumably satisfied both the employers and the unions as serving its purpose . . . We do not agree with the Trial Examiner that it is essential that a public member sit on grievance panels . . ." (48 LRRM at 1526 and fn. 6).

pursuant to the grievance machinery or other methods of settlement agreed upon by the parties—regardless of what the methods so chosen may be called. *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957); *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593 (1960). Thus, in *Lincoln Mills*, *supra*, the Court pointed to a House Report on Section 301 which, so far as relevant here, stated: "When parties have agreed on *a procedure* for settling their differences, and the agreement is in effect, they will be required to follow the procedure . . . Most agreements provide procedures for settling grievances, *generally* including some form of arbitration as the last step." H.R. Rep. No. 245, 80th Cong., 1st Sess., p. 21 (emphasis supplied). In the same opinion, Justice Douglas stated that the Norris-LaGuardia Act does not preclude enforcement of arbitration agreements because that Act indicates "a congressional policy toward settlement of labor disputes by arbitration, for it denies injunctive relief to any person who has failed to make 'every reasonable effort' to settle the dispute by *negotiation, mediation, or 'voluntary arbitration'*." (353 U.S. at 458) (emphasis supplied). In *American Mfg. Co.*, *supra*, addressing itself to the Sixth Circuit, the Court stated:

> "Section 203(d) of the Labor Management Relations Act, 1947, 61 State (sic) 154, 29 U.S.C. 173(d), states, 'Final adjustment *by a method agreed upon by the parties* is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement . . .' *That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play.*" (363 U.S. at 566) (emphasis supplied).

Finally, in the very recent decision of *Retail Clerks* v. *Lion Dry Goods, Inc.*, 369 U.S. 17 (1962), this Court re-

versed the opinion of the Sixth Circuit that a "Statement of Understanding" between the parties was not enforceable under Section 301. On that occasion, it was the view of the court below that Section 301 applied solely to "collective bargaining agreements." In disagreement with that view, this Court stated the following:

> "The words of Section 301(a) require no such narrow construction as is suggested; rather, they negate it... The section says 'contracts' . . . If this kind of strike settlement were not enforceable under Section 301(a), responsible and stable labor relations would suffer, and the attainment of the labor policy objective of minimizing disruption of interstate commerce would be made more difficult . . . It is enough that this is clearly an agreement between employers and labor organizations significant to the maintenance of labor peace between them. It came into being as a means satisfactory to both sides for terminating a protracted strike and labor dispute. Its terms affect the working conditions of the employees of both respondents . . . It resolved a controversy arising out of, and importantly and directly affecting, the employment relationship. Plainly it falls within Section 301(a)." (369 U.S. at 25-28).

The lesson is clear, for the Section indeed says "contracts," and not "arbitration awards." Suffice it to say that the method of settling disputes in question here constitutes the agreement of the parties—it is their contract. And it has achieved, and continues to achieve, the same worthy objectives outlined by the Court in *Lion Dry Goods*. "Plainly it falls within Section 301(a)." (369 U.S. at 28).

In the instant case, however, the court below has held that the satisfactory grievance procedure contained in their agreements—a procedure that has permitted an amicable relationship for 18 years or more—is no longer a "contract" between them and is unenforceable under Section 301. The effect of the decision upon labor management relations is certain to be adverse. Many collective bargaining agreements across the nation contain similar methods for the settlement of disputes. Affiliates of the International Brotherhood of Teamsters, of which the petitioner is one,

alone are parties to at least six area-wide agreements utilizing similar methods of grievance settlement by Joint Committees and covering more than 300,000 employees.[4] Whether the reason for the employment of these particular procedures be the parties' greater confidence in their own representatives, the great expense of submission to an outside arbitrator, or a belief that the settlement of disputes between the parties themselves breeds an atmosphere of greater cooperation, the parties thereto have proceeded on the assumption that they are enforceable as are any other contracts. In practical terms, the decision below would now coerce these persons into revising their agreements to provide for a procedure specially favored by the court below, on pain of being barred from the courthouse door. As to those agreements that are not so revised, the final steps in the grievance procedure would no longer be amicable private or judicial settlement,[5] but interruptions in production, strikes, lockouts and general unrest and suspicion.

If these consequences are to be averted, and if the plain meaning of Section 301, the Congressional policy

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[4] The Automobile Carrier Truckaway and Automobile Carrier Driveaway Agreements cover 15,000 employees. The Central States Area—Local Cartage Agreement, presently before this Court, covers 100,000 employees. The Central States Area—Over-the-Road Motor Freight Agreement, which was extensively discussed in *Local 24, Teamsters* v. *Oliver*, 358 U.S. 283 (1959), covers 55,000 employees. The Motor Transport Labor Relations, Inc. (Philadelphia, Pa., area) covers 25,000 employees. The New York-New Jersey Area General Trucking Agreement covers 50,000 employees. Finally, the Western States Area Master Freight Agreement covers 60,000 employees. See Ward and Groner, "Major Agreement Expirations and Reopenings in 1962," Monthly Labor Review, pp. 1316-1317 (December 1961).

[5] It should be noted that by providing, in Article VIII, that there shall be no "legal proceedings" without prior resort to the grievance procedure, the parties themselves contemplated that the decision produced by resort to that procedure could be legally enforced in the courts.

underlying it, and decisions of this Court establishing a body of federal substantive law thereunder are to be adhered to, the interpretation of the law and construction of the contract by the court below must be held to be erroneous.

II

THE FEDERAL DISTRICT COURT WAS NOT DEPRIVED OF JURISDICTION OVER THE UNION'S ACTION TO ENFORCE THE AWARD OF THE JOINT AREA CARTAGE COMMITTEE MERELY BECAUSE ONE OF THE BENEFITS OF THE AWARD WOULD ACCRUE TO INDIVIDUAL EMPLOYEES REPRESENTED BY SAID UNION.

A second ground for the decision below was that "the purpose of the action is to recover for the individual plaintiffs lost wages together with incidental benefits to the Union based on the payment of wages to employees." According to that Court, this "brings the facts of this case within the ambit of *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U.S. 437." (R. 29).

The *Westinghouse* doctrine, however, has apparently been overruled, *sub silentio*, by subsequent decisions of this Court. In *Westinghouse*, a majority of the Justices held that federal courts may not assume jurisdiction over an action brought by a union under Section 301 to recover wages owing to individual employees under a collective bargaining agreement. The distinction drawn by the Court was between uniquely personal rights of employees arising out of individual hiring contracts and rights and obligations "running to the union." The principal basis of that decision was the Court's desire to avoid the constitutional difficulties inherent in a holding that Section 301 vested federal courts with jurisdiction over contract actions without empowering them to fashion federal substantive law to govern such actions. That problem was resolved in

Lincoln Mills, supra, where the Court held that Section 301 was not a mere grant of jurisdiction, but a direction to the federal courts to create a body of federal law governing the enforcement of contracts under that Section. Thus, the rationale underlying the *Westinghouse* decision was swept aside. Subsequently, in *Charles Dowd Box Co.* v. *Courtney,* 368 U.S. 502 (1962), the Court affirmed a decision of the Supreme Judicial Court of Massachusetts upholding a judgment for back wages in favor of employees, in a suit brought by union officers on behalf of the membership under Section 301.[6] It would seem, therefore, that both the legal and the factual foundations of the *Westinghouse* case have been shattered, leaving nothing but an empty shell. And if the shell continues to emit echoes, they should now be silenced by clear expression such as that utilized by the dissenting opinion in *Westinghouse:*

> "We make mountains out of molehills in not allowing the union to be the suing as well as the bargaining agency for its members as respects matters involving the construction and enforcement of the collective bargaining agreement." (348 U.S. at 465, 466).

The expression finds approval in the opinion of the commentators,[7] Section 301 itself,[8] and the common sense view of the realities of collective bargaining.[9]

In any event, assuming *Westinghouse* retains some vital-

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[6] Although the suit originally sought a determination as to the validity of the whole contract, as well as back pay, the former aspect of the case became moot and the final decree entered in the case merely awarded damages representing wages owed to the employees.

[7] Both Professors Cox and Gregory, for example, favor giving the Union control over all claims arising under the collective agreement. Cox, "The Legal Nature of Collective Bargaining Agreements," 57 Mich. L. Rev. 1, 24 (1958); Gregory, "The Law of the Collective Agreement," 57 Mich. L. Rev. 635, 642-643 (1959).

[8] "Any such labor organization may sue or be sued as an entity and *on behalf of the employees whom it represents* in the courts of the United States." (emphasis supplied).

ity, it is inapplicable to the instant case. That case involved a suit solely for wages, under a contract provision requiring the payment of compensation to employees, and was strictly limited to its facts by the various opinions of members of the Court. Thus, Justices Frankfurter, Burton and Minton stated that no jurisdiction may be asserted over union suits to enforce contract provisions "relating to compensation, terms peculiar in the individual benefit which is their subject matter . . ." (348 U.S. at 460). Justices Warren and Clark emphasized that the union was attempting to enforce "the uniquely personal right of an employee for whom it had bargained to receive compensation for services rendered his employer." (at 461). Finally, Justice Reed noted: "The claim for wages for the employees arises from separate hiring contracts between the employer and each employee . . . The duty to pay wages to an employee arises from the individual contract . . ." (at 464). It is plain enough that in excluding the enforcement of "uniquely personal" rights from union control in terms of suits under Section 301 the Court had in mind the attempted enforcement by unions of such provisions of collective agreements that merely repeat those ordinarily found in individual hiring contracts. The Court was apparently of the view that these latter provisions were not dependent upon union organization and were of little importance to the whole body of employees in the collective sense. But such is not the case here. In this case, the suit by the Union seeks not only back pay, but reinstatement of the discharged employees and reimbursement of the Health and Welfare Fund and Pension Plan as well. Significantly, the request for reinstatement is sought on the ground that the Company had violated Article IX which protects employees from dis-

[9] Further argument on this point would be repititious of the excellent treatment accorded it in Reply Briefs for the Petitioner (filed September 26, 1962), and for the United States as Amicus Curiae (filed October 9, 1962) in *Smith* v. *Evening News Ass'n*, Case No. 13 (October Term, 1962).

charge for aiding the cause of unionism in the event they choose individually to refuse to cross a picket line. (R. 4, 29). This type of provision, while common to collective bargaining agreements, is entirely foreign to individual hiring contracts and plainly may not be viewed as uniquely personal.[10] The same is true of course of the Union's attempt in this case to enforce the Health and Welfare and Pension provisions of the collective agreement. (R. 4). True, employer payments under the foregoing provisions are geared to the number of employees represented and are delinquent only as to the six dischargees in the case. But both provisions establish independent trust funds that are jointly administered by trustees appointed by the contracting parties. They are very definitely the unique product of collective bargaining and are outside the realm of individual enforcement. Perhaps the only accurate statement of description of the instant action is that it involves "a coalescence of individual and collective interests."[11] *Westinghouse* leaves such actions untouched.[12]

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[10] That a simple discharge is within the realm of union interests and often gives rise to collective action was expressly recognized by Justice Frankfurter in his opinion in *Westinghouse* (at 457-458).

[11] Meltzer, "The Supreme Court, Congress, and State Jurisdiction over Labor Relations," 59 Col. L. Rev. 269, 272 (1959).

[12] Even if the Court continues to adhere to its ruling in *Westinghouse*, the jurisdiction of the lower court in this case may be affected only insofar as the Union's action seeks to recover back pay to which the individual employees are entitled. It is clear, however, that to the extent that the Union's complaint seeks reinstatement of the six employees to their former positions and contribution by the employer to the Health and Welfare and Pension Funds Section 301 jurisdiction obtains. Since to that extent, at least, the jurisdiction of the lower court was properly invoked, it follows—under the well-established doctrine of pendent jurisdiction—that it was also empowered to assert jurisdiction over, and to decide, that portion of the action relating to the wage claim. *Hurn* v. *Oursler*, 289 U.S. 238 (1933); *Siler* v. *Louisville & N. R. Co.*, 213 U.S. 175 (1909); *Lincoln Gas & E. L. Co.* v. *Lincoln*, 250 U.S. 256 (1919).

Even clearer, by virtue of decisions of this Court, is the fact that *Westinghouse* has no application to actions brought by unions under Section 301 in enforcement of the grievance machinery agreed to by the parties to the collective agreement, even where the tangible benefits to be gained by success would accrue solely to individual employees. *Lincoln Mills*, for example, was a union action to enforce an agreement to arbitrate a grievance which, at the time of the decision, amounted to nothing more than back wages owing to individual employees. Justice Douglas, for the Court, distinguished *Westinghouse:*

> "The basic question concerned the standing of the union to sue and recover on those individual employment contracts. The question here concerns the right of the union to enforce the agreement to arbitrate which it has made with the employer." (353 U.S. at 456, fn. 6).

In a concurring opinion, Justices Burton and Harlan wrote:

> "The District Court had jurisdiction over the action since it involved an obligation running to a union—a union controversy—and not uniquely personal rights of employees sought to be enforced by a union." (at 760).

In a companion case, *General Electric Co.* v *Local 205, UEW*, 353 U.S. 547 (1957), the Court permitted the assertion of Section 301 jurisdiction over a union action to compel arbitration of an employee claim of wrongful discharge. Concurring in *American Mfg. Co., Warrior and Gulf Nav. Co.*, and *Enterprise Corp.*, where this Court ordered the enforcement of arbitration agreements and awards thereof pursuant to Section 301, Justice Brennan—joined by Justices Harlan and Frankfurter—stated the issue as follows:

> "The issue concerns the enforcement of but one promise—the promise to arbitrate in the context of an agreement dealing with a particular subject matter, the industrial relations between employers and employees . . . And I emphasize this, for the arbitration promise is itself a contract." (363 U.S. 569-570).

In all Circuits which have considered the issue, except the Sixth, the courts have limited the application of *Westinghouse* to actions brought by unions seeking solely and directly to recover for individual employees personal benefits under the contract, in strict adherence to the foregoing admonitions of this Court. The *Lincoln-Mills-Westinghouse* dichotomy was most comprehensively yet precisely explained in *United Steelworkers v. Pullman-Standard Car Mfg. Co.*, 241 F2d 547, 551 (3rd Cir. 1957):

> "Collective bargaining agreements usually include provisions which regulate the procedure to be followed by the employer and the union inter sese in the handling of grievances and the solving of other labor problems which may arise in the future. Such regulations of the union management relationship in the administration of the process of collective bargaining are obviously a special concern of the Union as an organization and, in that sense, their enforcement is not a matter 'uniquely personal' to the individual employees. True, the subject matter in dispute may or may not be primarily personal to employees. Any agreed grievance procedure may cover controversies ranging from wage disputes to questions of union recognition. But so long as the matter immediately in issue is an alleged obligation to arbitrate, or negotiate or follow some other procedure in administering the collective agreement, the union is directly and primarily concerned."

That enforcement of grievance provisions of collective bargaining agreements may not be deemed "personal to employees" was similarly stressed in *Item Co. v. N.O. Newspaper Guild*, 256 F2d 855 (5th Cir. 1958), cert. den. 358 U.S. 867 (1958), involving a union suit to require the employer (appellant) to submit to arbitration the discharge grievance of a single employee. "We think it plain," said the court, "that appellant, in arguing that the suit is within the prohibition of the *Westinghouse* case, has misunderstood the demand being made by appellee, has in short misconceived the nature of its suit, which was filed for the sole purpose of obtaining enforcement of a contract agreement

between the Union and employer for arbitration, an agreement existing between union and employees and not employee and employer." (at 856). The same rationale has been applied as to suits by unions *to enforce arbitration awards* granting back pay to individual employees. Thus, in *Textile Workers Union* v. *Cone Mills Corp.*, 268 F2d 920 (4th Cir. 1959), cert den. 361 U.S. 886 (1959), the court concluded—in reliance upon decisions of this Court—that "Congress intended to place the enforcement of the arbitration clauses of labor contracts in the hands of the federal courts even if the employees are the ultimate beneficiaries." (at 924).[13]

In the foregoing fashion, the courts have made it abundantly clear that union actions to enforce agreements to arbitrate and awards pursuant to such agreements are enforceable under Section 301, even where the ultimate tangible benefit to be derived is "to recover for the individual plaintiffs lost wages." (R. 29). The opinion of the court below that benefits accruing to the union in such actions are "incidental" misinterprets the authoritative decisions of this Court and misconceives the nature of collective bargaining agreements and the union's role in their enforcement. The collective agreement is "a code for the government of an industrial enterprise." *Aeronautical Industrial District Lodge 72* v. *Campbell*, 337 U.S. 521, 528 (1949). As stated by this Court in *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192, 202 (1944), "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents."[14] The major ve-

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[13] And cf., *American Brake Shoe Co.* v. *Auto Workers Local 149*, 285 F2d 869 (7th Cir. 1961) with *Local Lodge 2040, IAM* v. *Servel, Inc.*, 268 F2d 692 (7th Cir. 1959).

[14] According to then Professor Cox, the "governmental nature of a collective bargaining agreement should have predominant influence in its interpretation." Cox, *supra*, note 7, at 25. Professor

hicle for the administration and perpetuation of this system of self-government with a minimum of industrial strife is very obviously the grievance procedure agreed to by the parties. As the "exclusive representative" of the employees under Section 9 of the Act, it is the union's function to maintain the vitality of the agreement upon which the collective government is based.[15] The union is, in this case, attempting to perform that necessary function by enforcing a promise, made directly to it, to abide by awards rendered by a bipartisan committee at the final stage of the grievance procedure. It is a very basic promise—the only one in the contract that underlies the administration and interpretation of each and every one of the remaining provisions of the agreement. To deny its enforcement by the union is to deprive the union of effectiveness as the exclusive representative of the employees and thus deny the very basis for its existence. It further has the effect of subverting the statutory grant of collective power wherever the attempted enforcement of that power coincides with an attempted enforcement of "individual" rights, a result which this Court long ago denounced.[16]

In short, even if *Westinghouse* remains vital, its applica-

Shulman has emphasized, as have many other commentators, the parties' "continuing relationship," their "going systems of self-government," and their "autonomous system." Shulman, "Reason, Contract, and Law in Labor Relations," 68 Harv. L. Rev. 999, 1024 (1955).

[15] While the individual employees involved may be entitled to seek direct recovery of back pay and other personal forms of relief, as apparently envisioned by *Westinghouse*, they may not do so in reliance on, or in enforcement of, an award rendered by the grievance committee. Cf. *MacKay* v. *Loew's, Inc.*, 182 F2d 170 (9th Cir. 1950). That is the role of the union alone.

[16] "The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group." *J. I. Case Co.* v. *NLRB*, 321 U.S. 332, 338 (1944).

tion in this case clearly contravenes the decisions of this and other federal courts and subverts the policies of Sections 9 and 301 of the Act.

III

THE COURT BELOW EXCEEDED THE BOUNDS OF THE PERMISSIBLE SCOPE OF REVIEW BY MAKING A DECISION ON THE MERITS OF THE GRIEVANCE AND, IN SO DOING, RESOLVING DISPUTED FACTS WITHOUT THE BENEFIT OF EVIDENCE OR ARGUMENT BY THE PARTIES.

A final ground for the conclusion of the court below was its decision, *on the merits*, that plaintiffs were not entitled to reinstatement and back pay. This decision is contrary to that of the Joint Area Cartage Committee, and plainly in conflict with the following provision of the contract:

> "It shall not be a violation of this contract and it shall not be cause for discharge if any employee or employees refuse to go through the picket line of a union or refuse to handle unfair goods." (R. 4, 29).

The court arrived at its conclusion by an independent interpretation of the contract. In particular, the court stated that the foregoing clause "must" be read with the following:

> "The insistence by any Employer that his employee . . . go through a picket line after they have elected not to, and if such refusal has been approved in writing by the responsible officials of the Central States Drivers Council, shall be sufficient cause for an immediate strike of all such Employer's operations without any needs of the Union to go through the grievance procedure herein." (R. 29).

Because the complaint did not allege that the refusal to go through the picket lines was given such approval, the court

concluded that the individual plaintiffs were not warranted in "leaving their jobs" and therefore the discharge was justified. (R. 29). The provision cited by the court has nothing to do with the rights of individuals to refrain from crossing a picket line. It is obviously a limited exception to the "no strike" clause, *permitting the Union to strike* in the event the rights of employees are denied by the Employer. The "approval" which the court found lacking here is necessary only in the event the Union desires to strike. The Union, however, neither sought such approval nor intended to strike. It chose to uphold the rights of employees under the first-quoted clause by resort to the grievance machinery of the contract. Thus, the interpretation placed upon the contract by the court below is patently wrong.

Even if the provision relied on by the court is arguably pertinent, its application by the court required the assumption of certain facts that may be very much in dispute between the parties: First, that the foregoing clause dealing with the right to strike was intended by the parties to affect the right to discharge; second, that individual refusals to cross a picket line may be equated with a union "strike," within the meaning of that section; third, that Local 89 was in fact engaged in such a "strike" at the time in question; and fourth, that the Union engaged in such "strike" without having gone through the grievance procedure. These crucial "fact findings" were made without the benefit of evidence or argument in the courts below. In fact, the only ground relied on by the District Court for dismissal of the complaint was lack of jurisdiction. Nor was this construction of the contract suggested by the respondent before the grievance committees or in its brief or argument to the court below. Had petitioners been timely warned of the *matter of defense* now relied on by the court in respondent's behalf, they undoubtedly would have been in the position to

submit evidence and argument on the point or to move to amend the complaint. But such opportunity was denied absolutely. The rules are well settled that an appellate court may not, consistent with the accepted and usual course of judicial proceedings and fairness to the parties, assume facts not stated in the complaint upon review of a dismissal on the pleadings, or make findings of fact *dehors* the record before it. As stated in *Carr* v. *Corning*, 182 F2d 14, 21, 22 (D.C. Cir. 1950):

> "An appellate court cannot be the trier of facts, and particularly it cannot decide a question of fact upon evidence which is not in the record. We cannot make findings of fact different from the allegations of the pleadings and affidavits upon which summary judgment or dismissal was entered below . . . We cannot draw conclusions by speculation where the data necessary for certainty was not given the trial court."[17]

In addition, said decision on the merits of the dispute that had already been decided by the Committee, exceeds the bounds of the limited role of the courts in cases arising under Section 301, as clearly defined by this Court. In *American Mfg. Co., supra*, the Court reversed a similar decision of the Sixth Circuit that a grievance of which arbitration was sought was frivolous and not subject to arbitration. During the course of the opinion, this Court took great pains to examine the relationship between the arbitrator and the judge in a Section 301 context:

> "The collective agreement requires arbitration of claims that courts might be unwilling to entertain. In the context of the plan or industry the grievance may assume proportions of which judges are ignorant. Yet, the agreement is to submit all grievances to arbitration, not merely those that a court may deem to be meritorious . . . The function of the court is very limited when the parties have agreed to submit all ques-

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[17] See also *U.S.* v. *Hoffman*, 335 U.S. 77 (1948); *Ex parte Century Indemn. Co.*, 305 U.S. 354 (1938).

> tions of contract interpretation to the arbitrator . . . Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator . . . The courts, therefore, have no business weighing the merits of the grievance . . ." (363 U.S. at 567-568).

In *Enterprise Corp., supra*, the Court delineated the function of the courts upon review of an arbitration award already rendered:

> "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." (363 U.S. at 596).
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> ". . . the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." (363 U.S. at 599).

Here, the merits of the dispute were precisely that which the court below determined. Its own construction of the contract, as well as its final conclusion, differed from that of the Committee—whose construction and decision had been "bargained for" by the parties.[18] Absent the benefit of evidence or argument, the court determined the issue. And it did so in disregard of the narrow standard of review promulgated by this Court in *Enterprise*—to-wit, whether it is "apparent" that the decision of the Committee went beyond the submission. (363 U.S. at 598). Plainly, adherence to decisions of this Court compels a different result.

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[18] The Court's attempt to interpret the contract was of course in direct contravention of the agreement of the parties that all matters of interpretation would be settled by mutual agreement only. Article VIII, Section 1, subsections (c) and (h). (R. 9, 24).

CONCLUSION

It is respectfully submitted that, for the reasons stated above, the decision of the court below should be reversed with directions to remand the case to the District Court for such further action as is consistent with the opinion of this Court.

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